STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JEROME E. MANTERNACH, PAUL L. HEDGEPETH, and JOHN R. SISSEL, Petitioners/Public Employees,	)	
and	)	CASE NO. 89-MA-04, 89-MA-05, 89-MA-06
STATE OF IOWA, DEPARTMENT OF CORRECTIONS, Respondent/Public Employer.	)	

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Iowa Department of Personnel/Iowa Department of Corrections of a decision of an Administrative Law Judge (ALJ) issued on November 21, 1990, concerning grievances filed by three state employees pursuant to Iowa Code §§19A.14 and 20.1(3) and Ia.Admin.Code chapters 581 and 621 (1989). Oral arguments on appeal were presented to the Board on January 14, 1990, in Des Moines, Iowa, by Herbert Rogers, Sr., Attorney for the State, and Jeffrey A. Krausman, Attorney for Petitioner.

Based on our review of the entire record in this matter, briefs and arguments presented to the ALJ, and arguments presented to the Board, we hereby issue the following findings of fact and conclusions of law on appeal.

FINDINGS OF FACT

Although the basic facts underlying the Petitioner's grievances do not appear to be in dispute, we believe it helpful to an understanding of our decision on appeal to enlarge and somewhat modify the findings of fact determined by the ALJ. The relevant facts of this case are as follows:

This case involves three deputy wardens employed by the Iowa Department of Corrections (IDOC). John R. Sissel has been employed by the State since 1958 and has been a deputy warden/treatment director at the Iowa State Men's Reformatory at Anamosa since 1968. Paul Hedgepeth has been employed by the State since 1964 and has been a deputy warden at the penitentiary in Fort Madison since 1972. Jerome Manternach has been employed by the State since 1968, and has been a deputy warden at the Anamosa reformatory since 1974.

At the time each of these individuals accepted the position of deputy warden, statutes were in effect which provided for free housing or subsistence payments in lieu of free housing, to deputy wardens and treatment directors. At that time, prior to the reorganization of state government, Sissel, as a treatment director, was employed by a social services agency within the Department of Social Services, and Manternach and Hedgepeth, as deputy wardens, were employed by a separate Division of Corrections within the Department of Social Services. Chapter 218 of the Code governed all social services agencies, and §218.14 authorized free housing or subsistence payments in lieu of free housing for treatment directors, including Sissel. Chapter 246 of the Code governed the Division of Corrections, and §246.7 authorized free housing/subsistence payments for deputy wardens, including Manternach and Hedgepeth.[1]

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[1]Although it is not entirely clear from the record, it appears that sometime between 1968 and the present, and perhaps as a result of state reorganization, Sissel's position was placed under the Department of Corrections along with other deputy wardens, and that, currently, §246.305 of the Code is the provision applicable

Sissel, Hedgepeth and Manternach all were informed prior to accepting the position of deputy warden that the free housing/subsistence allowance was a benefit attendant to the position. After becoming deputy wardens, all three employees began receiving an additional cash payment each bi-weekly pay period as a housing, or subsistence allowance.

By July of 1974, Sissel had sold his home in Anamosa and moved to a State-owned home adjacent to the Anamosa institution. At that time, it was the policy of the warden of the Anamosa facility, Warden Auger, that deputy wardens live "on-site", and it was at Auger's request that Sissel sold his own home and moved into State-owned housing. Subsequent to this move, Sissel received free housing in lieu of cash subsistence payments.

Effective July 1, 1980, §218.14 of the Code was amended and §246.7 was repealed and replaced by the legislature with §246.305. The effect of these changes was to provide free housing for the division administrator only in the case of §218.14, and for the warden only, in the case of the new §246.305. For all others, including treatment directors and deputy wardens, free housing/subsistence payments were eliminated, and a requirement was instituted that any such employees occupying State-owned housing must pay the fair market rental value. §§218.14 and 246.305, Code of Iowa (1989). At that time, no immediate action was taken to eliminate Sissel's free housing or subsistence payments to Manternach and Hedgepeth.

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to all three grievants.

On February 17, 1982, a memo was sent to all wardens from William A. Armstrong, Chief, Bureau of Property Management, Department of Social Services, regarding employee housing rental rates to be effective at the institutions. The memo attached rental rates to be effective for the period July 1, 1982 - June 30, 1983, and noted that affected employees could either sign one-year rental agreements or opt to vacate the premises. The memo further stated:

> In accord with the opinion of the Attorney General's office, rental rates are not to be adjusted in consideration of a renting employee's duties and responsibilities nor in consideration of any prior understanding or agreements. Appropriate additional compensation for "on call" duties or per an agreement at the time of employment, which may have in the past been reflected in the rental rate, is to be determined on a case by case basis. If you feel that a renting employee is entitled to additional compensation by virtue of assigned duties or per prior agreements, please contact your division director for further authorization and processing instructions.[2]

In response to this memo, Anamosa Warden Auger sent a February 18, 1982 memo to Hal Farrier, Director of the Division of Corrections, stating his belief that Sissel should receive additional compensation because of his on-call duties and because "[t]he agreement with Mr. Sissel when he was appointed to the position of Assistant Warden clearly included providing the house and utilities as part of his employment."[3]

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[2]Joint Exhibit 11.

[3]Joint Exhibit 12.

Although the sequence of events is somewhat unclear from the record, it is apparent that by the end of June, 1982, a decision was made to begin charging Sissel a rental fee for his State-owned housing, but to reimburse him for the rental amount in the form of "other pay" in his bi-monthly paychecks. This decision is reflected in a "Report of Personnel Action" form submitted to Centralized Payroll in late June, 1982, authorizing an additional bi-monthly payment to Sissel of $97.14. On the form, the payment amount appears under the pay category "Educational Differential" rather than under "subsistence pay", but in a section for "Remarks", the following handwritten notes appear:

> Not educational differential. #218 code revision - only Supts free housing, others "fair market" value value - sq. ft. rental fee to compensate for loss of "free" housing pursuant to agreement with State Comptroller, R.W. Will gradually include in salary.[4]

The form indicates that the personnel action is to be effective retroactively, as of July 3, 1981. The form contains authorizing signatures of Paul Grossheim, Deputy Director of the Division of Corrections, James Anderson, for the Comptroller's Office, R.E. Wilson, Merit Employment Department (IDOP's predecessor) and Cynthia Gunther, personnel officer.

Both Hal Farrier, then the Director of the Division of Corrections, and Paul Grossheim, then the Deputy Director, testified that the personnel action form (hereafter Exhibit B) is reflective of an administrative determination, or agreement, that

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[4]Petitioner's Exhibit B.

deputy wardens already receiving a housing allowance should be "grandfathered-in" under the new legislation. Farrier indicated that, at some point subsequent to the legislative change in 1980 and prior to the 1982 submission of Exhibit B regarding Sissel's pay status, Farrier, Anderson (Merit Employment Department) and Wilson (Comptroller's Office) agreed that it was unfair to withdraw benefits that had been a condition of employment at the time of hire, and that current deputy wardens should be "grandfathered-in" and reimbursed an amount consistent with what they had been receiving as a subsistence allowance, while employees newly hired as deputy wardens would not receive this benefit. Farrier testified that it was his understanding that the extra pay should continue to be paid to those incumbents "grandfathered-in" for as long as they held their deputy warden positions.

Paul Grossheim (then Deputy Director under Farrier) testified as to a different understanding of how the "grandfathering" system was intended to work. Grossheim testified that his understanding of the "agreement" reached by the various administrative authorities was that incumbent deputy wardens would continue to receive the subsistence payments they had been receiving until those amounts could be "gradually absorbed" by regular salary increases. Grossheim stated ". . . it was our intention that this would go on until it could be absorbed through pay raises, and when that was done, why, then they would eventually comply with the law." Grossheim testified that this was what was intended by the

remark, on Sissel's personnel action form, "will gradually include in salary."[5]

After the processing of Exhibit B regarding Sissel's pay status in 1982, Sissel commenced paying a rental fee on his State-owned housing, and was reimbursed $97.14 per pay period to offset the fee. Hedgepeth and Manternach continued to receive a subsistence allowance each pay period, as they had previously. As the years went by, all three employees also continued to receive regular step, merit, and cost-of-living increases to their base salary to which they were entitled. All three employees had the "understanding" that they had been "grandfathered-in" under the new legislation.

In the ensuing years, the various State agencies underwent reorganization and the Merit Employment Department was replaced by IDOP. By 1988, Paul Grossheim had become the Director of the Iowa Department of Corrections (IDOC), and Chuck Lee had become the Deputy Director.

In the spring of 1988, Sissel was appointed acting warden at Anamosa following the death of Warden Auger. Merrie Murray, Personnel Director of IDOC, began processing the paperwork necessary to obtain the extraordinary duty pay and subsistence pay to which Sissel would be entitled as acting warden, and noticed that Sissel was already receiving subsistence pay, (or "educational differential," pursuant to the 1982 payroll document, Exhibit B). An investigation ensued, with Murray and Deputy Director Chuck Lee

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[5]Transcript, p. 344, 345.

questioning the legal authority for the continuance of extra payments to Sissel. Through this investigation, it was discovered that Hedgepeth and Manternach were also continuing to receive extra subsistence payments that were apparently not authorized by law. As a result of their review of payments that may legally be made to employees, and following discussions with the Attorney General's office, Murray and Lee could find no legal authority for the continuance of the subsistence payments to the three deputy wardens. Their concerns and findings were relayed to IDOC Director Grossheim, who likewise concluded that the payments were apparently being continued without legal authority.

On August 3, 1988, Grossheim sent memos to Wardens Thalacker and Nix at Anamosa and Fort Madison, notifying them that a review of payroll records indicated that Sissel, Manternach, and Hedgepeth were continuing to receive subsistence payments which did not comply with §246.305 of the Code. The memos requested that the wardens indicate their authority for permitting these payments, and, in the absence of any such authority, stated that the payments should be immediately discontinued.

Wardens Nix and Thalacker responded to Grossheim's memo in mid-August, 1988, arguing essentially that the subsistence payments to these three employees should be continued because of representations made to them as to employment conditions at the time of hire, and because they had been led to believe that they had been "grandfathered-in" under the new legislation. Both wardens urged that if no legal way could be found to continue

subsistence payments, the employee's salaries should be increased in some manner to help alleviate the loss in income.

On August 24, 1988, Assistant Attorney General John M. Parmeter issued an informal opinion in response to a request which had been submitted earlier by Chuck Lee, stating that, following the legislative changes, there was no longer any statutory authorization for the payment of housing allowance or subsistence payments to deputy wardens. (See Appendix A, attached).

In late August, 1988, Chuck Lee sent memos to Wardens Nix and Thalacker which notified them that the memos they had submitted in mid-August did not change IDOC's opinion that the housing allowances could not be justified by the Code, and which referenced the concurring attorney general's opinion. Lee directed the wardens to discontinue the payments, and, shortly thereafter, the payments were ceased, effective retroactively as of August 19, 1988.

In September, 1988, Sissel, Manternach and Hedgepeth filed the instant grievances with IDOP regarding the cessation of their subsistence payments. Each grievance proceeded through the various steps of the grievance procedure and was eventually denied by the IDOP Director, whereupon the grievants filed appeals with PERB. The appeals were consolidated for hearing by the ALJ, and, following hearing, the ALJ determined that the grievances should be granted. The State/IDOC then filed the instant appeal with the full Public Employment Relations Board.

Based on our review of the entire record in this matter we hereby issue the following:

CONCLUSIONS OF LAW

The grievance appeals filed by the three deputy wardens, as amended,[6] allege that the State violated §19A.1 of the Code and IDOP Rule 4.5(17)(I.A.C. 581-4.5[17]) by eliminating their extra housing/subsistence payments. The ALJ determined that the State's action was in violation of IDOP Rule 4.5(17), and, accordingly, found it unnecessary to address the issue of the alleged violation of §19A.1 of the Code.

On appeal, we concur with the State's position that neither §19A.1 of the Code nor IDOP Rule 4.5(17) was violated in this case, and that the ALJ's Proposed Decision and Order must be reversed, for the following reasons.

Section 19A.14(1), Code of Iowa (1987) sets out procedures for filing and processing grievances for certain state employees. Pursuant to that procedure, employees not satisfied with the third step grievance decision of the IDOP Director may appeal that decision to PERB. §19A.14(1) requires that, on appeal, "Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel."

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[6]The grievance appeals originally filed with PERB alleged that the State's action violated §19A.1 of the Code, but did not allege a violation of any specific IDOP Rule. Prior to hearing before the ALJ, the ALJ granted petitioners' Motion to Amend their appeals to also allege a violation of IDOP Rule 4.5(17). Although the State objected to this ruling before the ALJ, the State did not raise this issue on appeal to the Board.

Since the grievance appeals in the instant case specify alleged violations of §19A.1(2) and IDOP Rule 4.5(17), the issue for our determination is limited to whether the State substantially complied, or failed to substantially comply, with those provisions when it eliminated the "extra" payments that had been made to the grievants for a number of years.

The Statutory Issue:

Section 19A.1 creates the department of personnel, and provides, in relevant part, as follows:

> 2. The department is the central agency responsible for state personnel management, including the following:
> . . . .
> c. Compensation and benefits, including position classification, wages and salaries, and employee benefits. Employee benefits include, but are not limited to, group medical, life, and long-term disability insurance, workers' compensation, unemployment benefits, sick leave, deferred compensation, holidays and vacations, tuition reimbursement, and educational leaves.[7]

The thrust of the grievants' argument is that an employment agreement,or contract of employment, was created at the time of hire, when the deputy wardens verbally agreed with their respective employers that the free housing/subsistence payment was a benefit attendant to the position of deputy warden. The grievants assert that this employment agreement was later evidenced in writing by the statement on Sissel's Personnel Action Form (Exhibit B) signed by the proper administrative authorities, authorizing the

[7]§19A.1(2) Code of Iowa (1987).

continuance of the payments (supposedly under the category of "educational Differential" pay) to Sissel, pursuant to the administrative agreement that employees should be grandfathered-in under the old statute.

The grievants argue that the State violated the "employment agreement" by ceasing the payments in 1988, and, therefore, violated its §19A.1(2) obligation to administer, or manage, employee compensation and benefits. We find this argument unpersuasive, for a number of reasons.

We first note that we have no authority, or jurisdiction, to enforce employment contracts in general, even if proven to exist, except to the extent that a breach of contract also constitutes a violation of Chapter 19A or IDOP Rules.

In the present case, it is clear that the grievants were told at the time of hire that the free housing/subsistence allowance was a benefit or "condition of employment" attendant to the position of deputy warden. The employing administrators were simply relaying to the prospective deputy wardens the benefits that were then in place and authorized by law for the position of deputy warden. We think it doubtful that these verbal assertions amounted to the establishment of a "contract of employment" or "employment agreement" which guaranteed the continuing existence of that employment benefit (or any other existing employment condition) for any specified period of time. There is simply no evidence in the record that a guarantee was given to the grievants at the time of hire, either verbally or in writing, that the extra pay benefit (or

any other term or condition of employment) would continue to be provided throughout their tenure regardless of any action to the contrary taken by the legislature.

Similarly, we do not believe that the "agreement" reached between the three administrators to treat certain employees as "grandfathered-in" after the statutes were changed in 1980 can be said to constitute an "employment agreement" or "contract of employment" with certain guaranteed terms.[8] The record reveals that even the administrators themselves, who agreed to treat certain employees as "grandfathered-in", were possessed of differing understandings of the terms and duration of that "agreement".

Whether or not an "employment agreement" existed, we think it is quite evident from the record that what the administrators were really trying to do in the instant case was to circumvent the law because they felt that its impact on certain employees was unfair.

Whether the extra payments made to the grievants are referred to as "housing allowance/subsistence payments," "salary in lieu of subsistence payments," or "educational differential," it is clear that the intent of the administrators was to find some way of "grandfathering-in" the employees under the old legislation so that their subsistence payments could be continued. Their method of doing so with regard to Manternach and Hedgepeth was simply to

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[8]The remarks on Sissel's Personnel Action Form (Exhibit B) reflect an agreement reached by the three administrators among themselves - not with Sissel, and certainly not with Manternach and Hedgepeth.

ignore the new law and do nothing. Since those two deputy wardens were already receiving subsistence payments in lieu of free housing, some action would have to have been taken and payroll documents processed in order to discontinue the payments. No such action was taken, and the payments simply continued up to the time the irregularity was eventually discovered in 1988.

With regard to Sissel, the situation was more difficult, because payroll documents had to be generated in order to continue his subsistence benefit. Sissel was occupying State-owned housing rent-free when the directive came down in 1982 to either start charging rent or allow the employee the option of vacating the premises. The administrators then agreed to start charging rent to Sissel, but to generate the Payroll Action Form, Exhibit B, to start reimbursing him for those rental payments. Although the form indicates in one part that the payment represents "Educational Differential", the written explanation states that it is <u>not</u> "Educational Differential," but is really a payment to make up for the lost housing allowance.

The issue for our determination is whether, under these circumstances, IDOP violated its §19A.1(2) duty to manage or administer state employee compensation or benefits when it discontinued the extra payments to the three deputy wardens. We believe it did not, because we concur with the State's argument that IDOP's §19A.1(2) duty to administer compensation and benefit plans presupposes the existence of <u>legally authorized</u> compensation and benefit plans.

It is well settled that administrative agencies have only such authority as is specifically conferred upon them by the legislature or necessarily inferred from the statutes which created them.[9] This legal principle applies to all administrative agencies, including PERB, IDOC, and IDOP.

In the present case, when IDOC officials realized in 1988 that payments being made to the three grievants that appeared to be of questionable legality, reasonable steps were taken to investigate and analyze whether any legal authority existed for the continuance of payments. When Murray, Lee and Grossheim reviewed the statutory changes that had been made by the legislature and the current state of the law, they believed that the payments were clearly being made contrary to statute, and their opinion was bolstered by the informal Attorney General's opinion which Lee requested (Attached hereto as Appendix A).[10] Although we happen to agree with the legal analysis reflected in the Attorney General's interpretation of the law, we believe that it is not truly relevant whether we

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[9]Iowa Power and Light Co. v. Iowa State Commerce Comm'n., 410 N.W.2d 236 (Iowa 1987). See also Merchant's Motor Freight v. State Highway Comm'n., 239 Iowa 888, 32 N.W.2d 773 (1948); Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n., 268 N.W.2d 862 (Iowa 1978); Iowa Department Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980); Foley v. Iowa Department Transportation, 362 N.W.2d 208 (Iowa 1985).

[10]After the filing of the instant grievances, the grievants asked State Representative Andy McKean to request another Attorney General's opinion on the issue of subsistence payments. On September 14, 1989, Assistant Attorney General Parmeter issued an opinion, more detailed than the first, reaching the same legal conclusions, i.e., that the legislative changes made in 1989 operated to terminate the housing allowance for all deputy wardens, including those who were receiving it prior to the change in the law. That opinion is attached hereto as Appendix B.

agree or disagree with that statutory interpretation -- the real issue within our jurisdiction to determine is whether the State had a reasonable basis for determining that discontinuance of the payments was necessary in order to conform with Chapter 19A and IDOP rules. We believe that the State acted reasonably in this case.

Since the extra payments to the grievants were authorized after the 1980 legislative changes by State administrators who were exercising apparent authority, there is certainly no basis for requiring any restitution of improper payments (nor has the State even suggested that this would be appropriate). But when the existence of the continued payments was discovered in 1988, we believe that the State reasonably determined that the payments had to be ceased in order to comply with legislative mandate.

As noted, it is axiomatic that administrative agencies, such as IDOP, may exercise only such powers as are specifically granted or reasonably inferred by legislation. It would fly in the face of this limitation of authority and render legislative mandates ineffective if specific administrators could enter into side "agreements", clearly contrary to statute, that could somehow bind IDOP as part of its legislative authority to administer employee benefits. Accordingly, we conclude that the State did not violate, and, in fact, acted reasonably in an attempt to achieve compliance with, its Chapter 19A duty to administer employee compensation and benefits when it ceased the extra payments to the grievants in 1988.

The "Red-Circling" Issue (IDOP Rule 4.5[17]):

The primary theory relied upon by the ALJ in her proposed decision is that,when extra payments were continued to the three grievants after the legislative change in 1980, the rate of pay of the grievants was effectively "red-circled" under IDOP rules, and could not subsequently be discontinued. We disagree with this conclusion, for a number of reasons.

As noted by the ALJ, the concept of "red-circling" has existed in State personnel rules in some form for a number of years. In the current IDOP rules, "red-circled salary" is defined as "an employee salary that exceeds the maximum for the pay grade in the pay plan to which the employee's class is assigned." 581 I.A.C. §1.1 (1991).

The merit employment rule dealing with red-circling which was effective in the early 1980's (when the decision to "grandfather-in" the grievants was made) allowed for red-circling only when employees were reassigned to different pay grades. 570 I.A.C. §4.5(8) (1980). There was no red-circling rule even arguably applicable to the type of action that was taken here. It is also clear that the administrators had no intent at that time to "red-circle" the deputy wardens pay -- the intent was to achieve "grandfathering" of the subsistence pay, and there was never any discussion about or action taken regarding "red-circling".

Nonetheless, the grievants argue that, by 1988, red-circling rules were in effect that require IDOP to follow certain procedures in order to terminate any existing red-circling situation. Due to

the extra subsistence payments the grievants were getting, they in fact technically met the definition of red-circling because their overall rates of pay exceeded the maximum for their pay grade. Since IDOP failed to take proper steps to terminate this "red-circling", the grievants argue, IDOP's action was invalid.

This argument ignores the fact that the grievants pay arrangement up to 1988 lacked a fundamental element of the concept of red-circling -- that of freezing the salary or rate-of-pay of the employee for the duration of the red-circling period. The personnel rules concerning red-circling effective in 1979, 1980, and the current IDOP rules all encompass this requirement:

> 570 I.A.C. §4.5(8)(b)(1979): Employees in that class whose rate of pay exceeds the maximum step in the new lower pay grade shall be "red-circled" or frozen at the former rate of pay in the old pay range. (emphasis added).
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> 570 I.A.C. §4.5(7)(1980): No permanent classified employee, who is "red-circled" under this rule, shall receive a cost of living or economic adjustments unless such increases are specifically authorized by legislative action.
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> 581 I.A.C. §4.5(16)(1990): The director shall provide for the administration of economic pay adjustments. No employee whose pay is red-circled shall receive an increase in pay due to a pay plan adjustment unless it is specifically authorized by Acts of the general assembly or is due to an increase in pay granted in accordance with subrule 4.5(9), paragraph "c."

From the payroll documents in the record and other record evidence, it is clear that the three grievants continued to receive periodic merit and COLA salary increases to which they were entitled throughout the 1980's. Thus they were never "red-circled", or frozen at a particular level, and the IDOP rules

concerning red-circling were and are simply inapplicable to their situation. Accordingly, we find no violation of Rule 4.5(17).

CONCLUSION

In ceasing subsistence payments to the three grievants in 1988, IDOP did not fail to substantially comply with Chapter 19A.1(2) or IDOP Rule 4.5(17). The decision of the ALJ is hereby reversed, and the grievance appeals in consolidated Case Numbers 89-MA-04, 89-MA-05 and 89-MA-06 are hereby dismissed, in their entirety.

DATED at Des Moines, Iowa this 16th day of May, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD R. RAMSEY, CHAIRMAN

M. SUE WARNER, BOARD MEMBER

DAVE KNOCK, BOARD MEMBER